FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of	)	
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Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
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REPORT ON REGULATORY COORDINATION

Adopted: September 8, 2003 **Released: September 8, 2003**

By the Chief, Consumer & Governmental Affairs Bureau:

I. BACKGROUND

1. On March 11, 2003, President Bush signed the Do-Not-Call Implementation Act (Do-Not-Call Act), authorizing the Federal Trade Commission (FTC) to collect fees for the implementation and enforcement of a national do-not-call registry.[1] The Do-Not-Call Act also required the Federal Communications Commission (FCC or Commission) to issue a final rule in its ongoing rulemaking proceeding under the Telephone Consumer Protection Act (TCPA)[2] within 180 days of the Do-Not-Call Act's enactment. In so doing, the Do-Not-Call Act directs the FCC to consult and coordinate with the FTC to "maximize consistency" with the rules promulgated by the FTC. Congress recognized that because this Commission is bound by the TCPA, it would not be possible for the FCC to adopt rules that are identical to those of the FTC in every instance.[3] The FCC is required to report to Congress within 45 days after the promulgation of final rules in this proceeding, and annually thereafter.[4] This report is in response to this requirement.

2. On July 3, 2003, the FCC released a Report and Order (Order) revising the rules

[1] Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003), *to be codified at* 15 U.S.C. § 6101 *(Do-Not-Call Act).*

[2] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227. The TCPA amended Title II of the Communications Act of 1934, 47 U.S.C. § 201 *et seq.*

[3] *See* H.R. REP. No. 108-8 at 4 (2003), *reprinted in* 2003 U.S.C.C.A N. 688, 671.

[4] *See generally* Do-Not-Call Act, Sec. 4(a).

on telemarketing in compliance with the requirements of the Do-Not-Call Act.[5] The amended regulations were published in the Federal Register on July 25, 2003.[6] As directed by Congress, the FCC consulted and coordinated with the FTC to adopt a national do-not-call registry and other telemarketing rules that "maximize consistency" with the FTC's amended Telemarketing Sales Rule (TSR).[7] In addition, the FCC is in the process of negotiating a Memorandum of Understanding with the FTC to achieve an efficient and effective enforcement process that will promote compliance with federal telemarketing regulations. This Commission will also continue to work with the FTC to educate the public and regulated community about the national do-not-call program.

3. Pursuant to the requirements of the Do-Not-Call Act, this Report contains an analysis of the telemarketing rules promulgated by both agencies and of the few inconsistencies between the FCC's and FTC's rules. This report is submitted in accordance with Section 4(a) of the Do-Not-Call Act.[8] Section 4(a) states:

> (a) REPORT ON REGULATORY COORDINATION.—Within 45 days after the promulgation of a final rule by the Federal Communications Commission as required by section 3, the Federal Trade Commission and the Federal Communications Commission shall each transmit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a report which shall include--
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> (1) an analysis of the telemarketing rules promulgated by both the Federal Trade Commission and the Federal Communications Commission;
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> (2) any inconsistencies between the rules promulgated by each such Commission and the effect of any such inconsistencies on consumers, and persons paying for access to the registry, and
>
> (3) proposals to remedy any such inconsistencies.

II. JURISDICTION AND SCOPE OF TELEMARKETING RULES PROMULGATED BY EACH COMMISSION

A. FCC Jurisdiction and Rules

4. The TCPA requires the FCC to "initiate a rulemaking proceeding concerning the

[5] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, FCC 03-153 (rel. July 3, 2003) (*Order*). The Commission delegated its authority to the Chief of the Consumer & Governmental Affairs Bureau to issue the Report to Congress. *Order*, para. 217.

[6] *See* 68 Fed Reg. 44144 (July 25, 2003).

[7] *See* 16 C.F.R. Part 310. *See also* Comments filed by the FTC in response to the Commission's *Further Notice*; NARUC Winter Committee Meetings, February 23-26, 2003, at which FCC and FTC staff discussed the national do-not-call registry and ways to harmonize federal and state programs; Letter from James Bradford Ramsay, NARUC General Counsel, to FCC filed March 14, 2003 (NARUC *ex parte*).

[8] *See Do-Not-Call Act*, Sec. 4(a).

need to protect residential telephone subscribers' privacy rights" and to consider several methods to accommodate telephone subscribers who do not wish to receive unsolicited advertisements, including live voice solicitations.[9] The TCPA also requires the Commission to prescribe regulations to implement the statute's restrictions on the use of autodialers, artificial or prerecorded messages and unsolicited facsimile advertisements.[10] The Order published by the Commission on July 25, 2003, revises the current TCPA rules and adopts new rules to provide consumers with several options for avoiding unwanted telephone solicitations. Specifically, the Order establishes with the FTC a national do-not-call registry for consumers who wish to avoid unwanted telemarketing calls.[11] Because of the Commission's broad authority under the TCPA, the national do-not-call registry will cover all entities that use the telephone to advertise, including those entities over which the FTC lacks jurisdiction, such as common carriers, banks, credit unions, savings and loans, airlines, and companies in the business of insurance.[12] The FCC's jurisdiction also extends to both intrastate and interstate telemarketing calls.[13] The Commission did not require states to discontinue the use of their own do-not-call lists once the national registry goes into effect. States are permitted to administer their state lists and to enforce state regulations that are consistent with the TCPA and the rules established under the Order in state court.[14]

5. The national do-not-call registry will supplement the current company-specific do-not-call rules for those consumers who wish to continue requesting that particular companies not call them.[15] To address the more prevalent use of predictive dialers which result in significant numbers of hang-up and "dead air" calls, the FCC determined that telemarketers must ensure that any technology used to dial telephone numbers abandons no more than three (3) percent of calls answered by a person.[16] The FCC's new rules also require all companies conducting telemarketing to transmit caller identification (caller ID) information, when available, and prohibits them from blocking such information.[17] The FCC believes the rules adopted in the

[9] 47 U.S.C. § 227(c)(1)-(4). *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Notice of Proposed Rulemaking, 7 FCC Rcd 2736 (1992); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752 (1992); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Memorandum Opinion and Order, 10 FCC Rcd 12391 (1995); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Order on Further Reconsideration, 12 FCC Rcd 4609, (1997); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Notice of Proposed Rulemaking and Memorandum and Opinion Order, 17 FCC Rcd 17459 (2002).

[10] 47 U.S.C. § 227(b)(2).

[11] *See Order*, paras. 28-85.

[12] *See Order*, para. 27.

[13] *See* 47 U.S.C. § 152.

[14] The Commission concluded that the federal rules constitute a floor and therefore supersede all less restrictive state do-not-call rules. States may adopt more restrictive do-not-call laws governing intrastate telemarketing. The Commission concluded that when Congress enacted the TCPA it gave the FCC jurisdiction over both interstate and intrastate telemarketing calls with the intent generally to promote a uniform regulatory scheme. Therefore, any state regulation of interstate telemarketing calls that differs from FCC rules almost certainly would be preempted, although the FCC will consider any alleged conflicts on a case-by-case basis. *See Order*, paras. 79-85.

[15] *Order*, paras. 90-91.

[16] *Order*, paras.151-152.

[17] *Order*, paras. 179-184.

Order strike an appropriate balance between maximizing consumer privacy protections and avoiding imposing undue burdens on telemarketers.

B. FTC Jurisdiction and Rules

6. The FTC adopted its Telemarketing Sales Rule (TSR) in 1995 to implement the Telemarketing Consumer Fraud and Abuse Prevention Act, which directed the FTC to issue a rule prohibiting deceptive and abusive telemarketing acts or practices.[18] On December 18, 2002, the FTC issued amendments to its TSR that establish a national do-not-call registry and prohibit sellers and telemarketers from calling consumers whose numbers are entered on that registry. The FTC's amended rules also require telemarketers to transmit caller ID information and prohibit them from abandoning calls answered by consumers.[19]

7. The FTC's rules do not directly cover those entities over which it has no jurisdiction, including common carriers, banks, credit unions, savings and loans, companies engaged in the business of insurance, and airlines.[20] However, the FTC maintains that when an exempt financial institution, telephone company, airline, or nonprofit entity conducts its telemarketing campaign using a third-party telemarketer not exempt from the amended TSR, then that telemarketing campaign is subject to the provisions of the TSR. In addition, the FTC's jurisdiction does not extend to intrastate telemarketing calls.[21]

C. The Interplay of FCC and FTC Rules

8. We agree with Congress that consistency in the underlying regulations and administration of the national do-not-call registry is essential to avoid consumer confusion and regulatory uncertainty in the telemarketing industry. The rules adopted by the FCC in connection with the national registry are consistent with those of the FTC in most respects. Both the FTC and FCC adopted an exception from the national do-not-call registry for a seller who has an established business relationship (EBR) with a consumer.[22] And both sets of rules permit sellers to contact consumers registered on the national do-not-call list if they have obtained the prior express permission of those consumers. The FCC and FTC similarly concluded that the national registry will supplement the agencies' company-specific do-not-call rules for those consumers who want to determine which companies may not call them.[23] The FCC and FTC

[18] *See* Telemarketing Sales Rule, 16 C.F.R. Part 310 and Telemarketing Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108.

[19] *See Telemarketing Sales Rule, Final Rule,* Federal Trade Commission, 68 Fed. Reg. 4580 (Jan. 29, 2003) *(FTC Order).*

[20] *See FTC Order,* 68 Fed. Reg. at 4587.

[21] *See* FTC's amended rule at 16 C.F.R 310.2(cc).

[22] *See Order,* paras. 109-118; *see also FTC Order,* 68 Fed. Reg. at 4592. The FCC's definition of "established business relationship" requires a voluntary two-way communication between a person or entity and the consumer on the basis of a purchase, transaction, inquiry or application. *See* 47 C.F.R. § 64.1200(f)(3). The FTC's definition of "established business relationship" permits calls when the consumer has purchased, rented or leased goods or services from the seller or engaged in a financial transaction with the seller or made an inquiry or application regarding a product or service. *See* 16 C.F.R. § 310.2(n).

[23] The FCC's amended rules specify that company-specific do-not-call requests must be maintained for a period of five (5) years. *See* 47 C.F.R. § 64.1200(d)(6). The FTC's amended rules do not limit the duration of the obligation to maintain company-specific do-not-call requests.

each adopted rules restricting the use of predictive dialers and requiring telemarketers to transmit caller ID information.

9. In addition, while the FCC and FTC each have adopted rules establishing a national do-not-call registry, there will be only one centralized database of telephone numbers. The FTC has created and will continue to maintain the database, while both agencies will coordinate enforcement efforts pursuant to a Memorandum of Understanding negotiated between the two agencies. The national registry will provide residential consumers with a one-step option to prevent unwanted telephone solicitations. Although the majority of telemarketing provisions promulgated by each agency are consistent, a few inconsistencies, discussed in detail below, may warrant consideration by Congress.

III. RULE-BY-RULE ANALYSIS OF INCONSISTENCIES

A. Tax-Exempt Nonprofit and Charitable Organizations

1. FCC Rules

10. The term "telephone solicitation," as defined in the TCPA, does not include a call or message "by a tax-exempt nonprofit organization."[24] The FCC earlier concluded, and reaffirmed in its recent Order, that calls placed by for-profit telemarketers hired to solicit the purchase of goods or services or donations on behalf of a tax-exempt nonprofit organizations are exempt from the rules on telephone solicitations.[25] The FCC found that in crafting the TCPA, Congress sought primarily to protect telephone subscribers from unrestricted commercial telemarketing activities, finding that most unwanted telephone solicitations are commercial in nature.[26] In light of the record before the Commission, the FCC found no change in circumstances that warranted distinguishing those calls made by a professional telemarketer on behalf of a tax-exempt nonprofit organization and those made by the tax-exempt nonprofit itself.[27] The Commission recognized that nonprofit entities with limited expertise, resources and infrastructure, might find it advantageous to contract out its fundraising efforts.[28] Consistent with the TCPA, the FCC determined that a tax-exempt nonprofit organization that conducts its own fundraising campaign or hires a professional fundraiser to do so, will not be subject to the restrictions on telephone solicitations.[29] Thus, the FCC concluded that the national do-not-call requirements should not be extended to tax-exempt nonprofit organizations or calls made by independent telemarketers on behalf of tax-exempt nonprofit organizations.[30] The FCC similarly concluded that tax-exempt nonprofit organizations and entities that solicit contributions on their behalf, are not required to comply with the company-specific do-not-call rules.

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[24] 47 U.S.C. § 227(a)(3).

[25] *Order*, para. 128.

[26] Congress concluded that the two sources of consumer concern – high volume of solicitations and unexpected solicitations – are not present in solicitations by nonprofit organizations. H.R. Rep. No. 102-317 at 16 (1991).

[27] *Order*, para. 128.

[28] *Id.*

[29] *Id.*

[30] *Order*, para. 45.

2. FTC's Rules

11. The FTC emphasized in its order that one type of telemarketing activity which is outside the jurisdiction of the FTC Act, as interpreted by the FTC and the federal court decisions, is that conducted by nonprofit entities.[31] Thus, according to the FTC, the FTC's TSR does not reach telemarketing activities conducted by nonprofit organizations. The FTC concluded, however, that the USA PATRIOT Act's amendments to the Telemarketing Consumer Fraud and Abuse Prevention Act expands the TSR's coverage to include not only the sale of goods or services, but also charitable solicitations by for-profit entities on behalf of nonprofit organizations.[32] It concluded, however, that "despite its broad mandate to regulate charitable solicitations made via telemarketing, the USA PATRIOT Act amendments did not expand the [FTC's] jurisdiction under the TSR to make direct regulation of nonprofit organizations possible."[33] Therefore, the FTC determined to exempt solicitations to induce charitable contributions via outbound telephone calls from the national do-not-call registry. However, under the FTC's amended rules, nonprofit entities must, when using for-profit telemarketers, comply with the company-specific do-not-call rules.[34] This determination is inconsistent with the FCC's rules that exempt nonprofits—whether they hire for-profit telemarketers or not—from the company-specific do-not-call requirements.[35]

3. Effect of Inconsistent Rules

12. Tax-exempt nonprofit entities that make *interstate* telemarketing calls and hire for-profit telemarketers to solicit on their behalf, are subject to the FTC's rules.[36] Thus, to ensure compliance with both sets of rules, such organizations will have to maintain do-not-call lists in accordance with FTC requirements, despite the fact that the FCC's rules exempt such entities from its company-specific do-not-call requirements. Moreover, consumers who are called by tax-exempt nonprofit organizations may find this inconsistency confusing, as they are unlikely to be able to determine whether the nonprofit organization is making an intrastate or interstate call, or whether the entity is using a for-profit telemarketer to make the call.

13. Proposal: The FCC proposes that the two agencies work together to remedy this inconsistency. If Congress nevertheless believes that action on its part is necessary, Congress could act to ensure that the two sets of rules are consistent.

B. Personal Relationship Calls

1. FCC's Rules

14. Under the FCC's new rules, the national do-not-call rules do not apply to calls

[31] *See FTC Order*, 68 Fed. Reg. at 4585.

[32] *See FTC Order*, 68 Fed. Reg. at 4585.

[33] *See FTC Order*, 68 Fed. Reg. at 4586.

[34] *See FTC Order*, 68 Fed. Reg. at 4582, 4589

[35] *Order*, para. 95.

[36] Because the FTC lacks jurisdiction over intrastate calls, tax-exempt nonprofit organizations that make only intrastate calls are required to comply only with FCC rules.

made to persons with whom the marketer has a "personal relationship."[37] A "personal relationship" refers to an individual personally known to the telemarketer making the call. In such cases, the Commission believes that calls to family members, friends and acquaintances of the caller will be both expected by the recipient and limited in number. The FCC found that the common sources of consumer frustration association with telephone solicitations—high volume and unexpected solicitations—are not likely present when such calls are limited to persons whom the marketer has a personal relationship. Accordingly, the Commission found that such calls do not represent the type of "telephone solicitations to which [telephone subscribers] object."[38] The Commission emphasized in its Order that this determination does not permit companies or individuals to make calls based on referrals from existing customers and clients.[39] The Commission also explained that section 227(c)(1)(E) provides the Commission with discretion in implementing rules to protect consumer privacy to "develop proposed regulations to implement the methods and procedures that the Commission determines are the most effective and efficient to accomplish the purpose of this section."[40]

2. FTC's Rules

15. The FTC did not adopt a similar approach for personal relationship calls in its rulemaking proceeding. However, the FTC has indicated in a letter to Congress that it expects to clarify in a compliance guide that it does not intend to target individuals calling a small number of personal referrals out of their own homes for law enforcement action by the FTC staff.[41]

3. Effect of Inconsistency

16. To ensure compliance with the FTC's rules, telemarketers will likely have to avoid placing interstate calls to persons with whom they have a personal relationship, if such persons are registered on the national do-not-call list. This is despite the fact that the FCC rules recognize that the do-not-call rules do not apply to such calls. While many of these calls may well be intrastate, and outside the FTC's jurisdiction, this scenario may create some confusion for telemarketers.

17. Proposals: Given the FTC's enforcement intentions, the FCC does not believe that this is a major inconsistency and proposes that the two agencies work together to remedy it. If Congress nevertheless believes that action on its part is necessary, Congress could act to ensure that there is a uniform approach to calls made to persons with whom the marketer has a personal relationship.

C. Abandoned Calls

1. FCC's Rules

18. In its Order, the FCC explained that the use of predictive dialers has become more

[37] *Order*, para 47.

[38] *Order*, para. 47.

[39] *Order*, para. 118.

[40] *Order*, para. 47 citing 47 U.S.C. § 227(c)(1).

[41] *See* Letter from Donald S. Clark, Secretary, FTC to the Honorable Amo Houghton, dated January 15, 2003.

prevalent in the telemarketing industry.[42] The record in our rulemaking proceeding revealed that predictive dialers are responsible for the vast majority of abandoned telemarketing calls—both hang-ups and "dead air" calls.[43] Telemarketers contend, however, that predictive dialers are a valuable tool for increasing productivity and lowering costs for sellers and, ultimately, for consumers.[44] Therefore, the Commission adopted a rule to reduce the number of abandoned calls consumers receive.[45] Under the FCC's new rules, telemarketers must ensure that any technology used to dial telephone numbers abandons no more than three (3) percent of calls answered by a person.[46]

19. The FCC determined that the three percent rate should be measured over a 30-day period.[47] This measurement will permit telemarketers to manage their calling campaigns more effectively because it allows for variations in telemarketing campaigns such as calling times, number of operators available, number of telephone lines used by the call centers, and other similar factors. The FCC's record also suggests that an abandonment rate measured over a 30-day period will allow telemarketers to more easily comply with the recordkeeping requirements associated with the use of predictive dialers.[48]

20. Under the FCC's rules, a call will be considered abandoned if it is not transferred to a live sales agent within two seconds of the recipient's completed greeting.[49] When a call is abandoned within the three percent maximum allowed, a telemarketer must deliver a prerecorded identification message containing only the telemarketer's name, telephone number, and notification that the call is for "telemarketing purposes." The purpose of this requirement is to eliminate "dead air" calls and allow consumers to identify who is calling them.[50] To allow time for a consumer to answer the phone, the telemarketer must allow the phone to ring for fifteen seconds or four rings before disconnecting any unanswered call.[51] Finally, telemarketers using predictive dialers must maintain records that provide clear and convincing evidence that the dialers used comply with the 3 percent call abandonment rate, "ring time," and two-second-transfer rule.[52]

21. The TCPA seeks primarily to protect subscribers from unrestricted commercial telemarketing calls, and therefore exempts calls or messages by tax-exempt nonprofit organizations from the definition of telephone solicitation. Therefore, the FCC determined not to extend the call abandonment rules to tax-exempt nonprofit organizations in the absence of

[42] *Order*, para. 147.

[43] *Id.*

[44] *Order*, para. 148.

[45] *Order*, paras. 151-152.

[46] *Id.*

[47] *Order*, para. 152.

[48] *Order*, para. 152.

[49] *Order*, para. 153

[50] *Order*, para. 155

[51] *Order*, para. 157.

[52] *Order*, para. 150.

further guidance from Congress.

2. FTC's Rules

22. In its proceeding, the FTC determined to prohibit abandoned calls, but also concluded that a seller or telemarketer will not be deemed to have violated the TSR if the seller or telemarketer can show that its conduct conforms to certain specified standards. To be eligible for this "safe harbor" under the FTC rules, the seller or telemarketer must: (i) employ technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured per day per calling campaign; (ii) allow the telephone to ring for at least fifteen (15) seconds of four (4) rings before disconnecting an unanswered call; (iii) whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person's completed greeting, promptly play a recorded message that states the name and telephone number of the seller on whose behalf the call was placed; and (iv) retains records establishing compliance with these requirements.[53] Unlike the FCC's rules, the FTC's call abandonment rules apply to nonprofit organizations when they hire for-profit telemarketers to solicit on their behalf.

3. Effect of Inconsistency

23. The FCC's rules on call abandonment are generally consistent with the FTC's, with the exception of a few provisions. First, the FCC has adopted a maximum rate of three percent on abandoned calls, while the FTC opted instead to prohibit all abandon calls, but provide in a "safe harbor" that telemarketers will not be in violation of the rule if, among other requirements, the telemarketer abandons no more than three percent of calls answered by a person. These differing approaches to abandoned calls may not prove problematic for telemarketers that must simply meet a 3 percent call abandonment rate to ensure compliance with both sets of rules. However, the FTC's rules require telemarketers to measure the 3 percent rate on a per day/per calling campaign basis, while the FCC rules permit them to measure the rate over 30 days. This inconsistency may make compliance potentially confusing for those telemarketers that are under the jurisdiction of both agencies.

24. The FCC's rules expressly permit telemarketers to send prerecorded messages to customers with whom they have an established business relationship or who have given their express consent to receive such calls. The FTC's rules prohibit such messages as abandoned calls. Telemarketers who deliver such messages lawfully under the FCC rules could be in violation of the FTC's call abandonment rules.

25. Finally, the identification message required under the FCC rules must contain not only the identity and telephone number of the telemarketer, but also a statement that the call is for "telemarketing purposes." The FTC message requires only the name and telephone number of the seller or telemarketer. As a result of this difference, telemarketers may conclude that compliance with the one agency's rules could subject them to liability under the other agency's rules.

26. Proposal: The FCC does not believe that these are major inconsistencies and

[53] *See* 16 C.F.R. § 310.4(b)(4)(i)-(iii). *See also FTC Order*, 68 Fed. Reg. at 4643-45.

proposes that the two agencies work together to remedy them. If Congress believes that action on its part is necessary to remedy any of the inconsistencies associated with the call abandonment rules, Congress could act to ensure that the FTC's rules conform with the FCC's rules.

IV. OTHER ISSUES

A. The Insurance Industry

27. The McCarran-Ferguson Act provides that "[t]he business of insurance ... shall be subject to the laws of the ... States which relate to the regulation ... of such business."[54] The McCarran-Ferguson Act further provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance."[55] During the FCC's rulemaking proceeding, a few commenters argued that any new rules the Commission adopts would not apply to entities engaged in the business of insurance, because such rules would conflict with the McCarran-Ferguson Act.

28. The FCC determined that the McCarran-Ferguson Act does not operate to exempt insurance companies wholesale from liability under the TCPA.[56] However, the FCC also recognized that to the extent that any state law regulates the "business of insurance" and the TCPA is found to "invalidate, impair, or supersede" such state law, it is possible that a particular activity involving the business of insurance would not fall within the reach of the TCPA.[57] Any determination about the applicability of McCarran-Ferguson, however, requires an analysis of the particular activity and State law regulating it. In addition, McCarran-Ferguson applies only to federal statutes that "invalidate, impair, or supersede" state insurance regulation. Courts have held that duplication of state law prohibitions by a federal statute do not "invalidate, impair, or supersede" state laws regulating the business of insurance.[58] Nor is the mere presence of a regulatory scheme enough to show that a state statute is "invalidated, impaired or superseded."[59] In the Order, the FCC noted that to the extent that the operation of McCarran-Ferguson on the TCPA is unclear, we would raise this issue in our Report to Congress as required by the Do-Not-Call Act.

29. To exempt the insurance industry from liability under the TCPA would likely confuse consumers and interfere with the protections provided by Congress through the TCPA. Although some State laws provide protections against unwanted telephone solicitations from

[54] 15 U.S.C. § 1012(a).

[55] 15 U.S.C. § 1012(b).

[56] *Order*, para. 51.

[57] *Order*, para. 52.

[58] *See, e.g., Merchant Home Delivery Serv. Inc. v. Frank B. Hall & Co. Inc.*, 50 F.3d 1486, 1492 (9th Cir. 1995) (holding federal statute prohibiting acts also prohibited under state law not to "invalidate, impair, or supersede" state law under McCarran-Ferguson); *United Farm Bureau Mut. Ins. Co. v. Metropolitan Human Relations Comm'n*, 24 F.3d 1008, 1016 (7th Cir. 1994) (holding duplicate prohibition of redlining under Indiana law not to preempt Fair Housing Act under McCarran-Ferguson Act).

[59] *See, e.g., Mackey v. Nationwide Ins. Companies*, 724 F.2d 419, 421 (4th Cir. 1984).

insurance companies, some are less restrictive than federal laws and many other States provide no such protections.

30. Proposal: As noted in the Commission's Report and Order, we believe the McCarran-Ferguson Act does not operate to exempt insurance companies wholesale from liability under the TCPA. However, we recommend that Congress make clear that the TCPA extends to such entities to ensure that consumers continue to benefit from the greatest possible privacy protections. Alternatively, we recommend that Congress expressly direct that insurance companies are subject to the TCPA.

V. GENERAL PROPOSAL TO REMEDY INCONSISTENCIES

31. As described above, the FCC and FTC have promulgated telemarketing regulations that are generally consistent in nature and scope. A clear inconsistency exists regarding the application of the rules to tax-exempt nonprofit organizations. More minor inconsistencies exist regarding the Commission's treatment of personal relationship calls and the adoption, by both agencies, of specific provisions in the call abandonment rules. The FCC believes that the two agencies should work together to remedy these inconsistencies.[60] If Congress believes it must act to remedy any of these inconsistencies in the interest of promoting a uniform regulatory scheme, we propose that Congress ensure that the FTC's rules are consistent with those adopted by the FCC. In the interim, we reiterate the FCC's intent to negotiate a Memorandum of Understanding between this Commission and the FTC to achieve an efficient and effective enforcement strategy that will promote compliance with federal regulations.

32. In addition, we have raised in this Report the issue of the TCPA's applicability to entities in the business of insurance. While we believe the McCarran-Ferguson Act does not operate to exempt insurance companies wholesale from liability under the TCPA, we propose that Congress clarify that the TCPA provides the Commission with the authority to enforce violations of the TCPA against such entities. Alternatively, we request that Congress provide the FCC with such authority.

[60] We note that both agencies' proceedings are, or will likely be, subject to petitions for reconsideration on some of these inconsistent issues.

VI. ADMINISTRATIVE MATTERS

33. This report is issued pursuant to the Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557, and section 227 of the Communications Act of 1934, as amended, 47 U.S.C. § 227.

34. IT IS ORDERED that the Secretary shall send copies of this report to the appropriate committee and subcommittees of the United States House of Representatives and the United States Senate.

FEDERAL COMMUNICATIONS COMMISSION

K. Dane Snowden
Chief, Consumer & Governmental Affairs Bureau